

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board. In addition, the Appeals Board considers the stipulation of the parties filed with the Division of Workers Compensation on December 15, 1993, stipulating to the claimant having returned to work full-time with accommodation at a comparable wage for the respondent on September 20, 1993. It

should be noted the stipulation has September 20, 1992, as the appropriate date, but The Appeals Board finds after a review of the file, that date is incorrect, with the claimant actually returning to work one year later.

It should also be noted the Award by the Special Administrative Law Judge shows the date of accident as March 22, 1993. This is incorrect and should instead read March 22, 1990.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) As a result of injuries suffered on March 22, 1990, claimant has suffered a fourteen percent (14%) permanent partial impairment to the body as a whole on a functional basis.

Claimant, a maintenance helper with respondent, was injured on March 22, 1990. Prior to the date of injury, claimant, due to a work-force reduction, had been moved from maintenance helper to laborer and was hauling one-hundred ten (110) pound bags of flour in the warehouse. On the date of injury, while loading these heavy bags of flour, he heard something pop in his shoulder. The shoulder pain gradually became worse until the claimant was forced to inform his lead man and seek medical treatment with Dr. Schoeling. Claimant was off work from March 22 through May 21, 1990, at which time he returned to work with restrictions.

Claimant, in returning to work, was placed in a job which required that he violate his restrictions. In October 1991, claimant's employer was again advised by the doctor of the restrictions placed upon claimant. When knowledge of these restrictions came to Mr. Doug Goff, personnel manager for respondent, he advised claimant's supervisor, who, in November 1991, sent claimant home. Respondent had a policy that people with restrictions who cannot work within these restrictions doing all of the duties of their job would be prohibited from working by the company.

Claimant was referred to Dr. Shrikrishna Vaidya and remained in Dr. Vaidya's care for a considerable length of time. Dr. Vaidya ultimately released claimant with restrictions of no repetitive lifting over twenty (20) pounds, and advised claimant should avoid climbing and repetitive activities above the shoulder. With these restrictions, claimant was unable to return to his employment at ADM. Dr. Vaidya is a non board-certified neurologist.

Dr. Vaidya had assessed claimant a twenty-five percent (25%) functional impairment to the body as a whole, of which twenty-one percent (21%) was due to claimant's physiological loss and four percent (4%) was for pain and suffering.

Claimant was later examined by Dr. Robert A. Rawcliffe, a board-certified orthopedic surgeon. Dr. Rawcliffe diagnosed a brachial plexopathy or brachial neuritis resulting in

symptoms to the claimant's arm and upper extremities. He found little wrong with claimant's shoulder other than claimant's unwillingness to move it through a full range of motion. He also found claimant to be depressed, with a low self-esteem. EMG and nerve conduction studies performed on claimant in 1990 were normal, as was an MRI done April 30, 1990 by Dr. Abbas. EMGs done in February 1991 did indicate median sensory latency showing mild chronic neurogenic changes in the right lower trunk distribution of the body, which is consistent with right traumatic brachial neuritis. Dr. Rawcliffe provided claimant no restrictions and further gave claimant no functional impairment rating as he felt the voluntary limitation in claimant's range of motion would adversely affect the rating.

Claimant was later examined by Dr. George Martin, a board-certified orthopedic surgeon. Both Dr. Martin and Dr. Rawcliffe disagreed with the limitations set on claimant by Dr. Vaidya. Dr. Martin felt claimant could return to work and perform his daily activities with no weight limitations. He assessed a ten percent (10%) functional impairment to the claimant's upper extremity, which converts to a six percent (6%) permanent partial impairment to the body as a whole.

As a result of the recommendations of Dr. Rawcliffe, claimant was referred to Donald E. Schrag, a Ph.D. in clinical psychology. Claimant underwent numerous tests under Dr. Schrag's supervision. Dr. Schrag found claimant to be very adversely affected by the treatment he suffered at the hands of the respondent. Claimant's transfer from the maintenance job to the physical labor job caused claimant to embellish his injury. Claimant saw this situation as a demotion, which led to certain psychological problems stemming from claimant's injury. Dr. Schrag felt claimant should be given the freedom to return to work if he wanted to, and used as an example the fact that claimant willingly worked for the respondent for over one year from May 1990 through November 1991 in violation of the medical restrictions and in pain.

Following the medical evaluations of Dr. Rawcliffe and Dr. Martin and the psychological evaluation of Dr. Schrag, respondent and claimant reached an agreement in September 1993 wherein claimant was returned to work with respondent on September 20, 1993, within the restrictions set forth by Dr. Rawcliffe and Dr. Martin, at a comparable wage.

K.S.A. 1992 Supp. 44-510e(a) provides in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The stipulation entered into between the parties indicates claimant has returned to work with respondent at a comparable wage as of September 20, 1993. As the claimant has returned to work at a comparable wage, the presumption of no work disability under K.S.A. 1992 Supp. 44-510e(a) is applicable and claimant is entitled to a functional impairment.

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence." K.S.A. 1992 Supp. 44-510e(a).

Dr. Vaidya felt claimant suffered a twenty-five percent (25%) permanent partial impairment to the body as a whole; attributing twenty-one percent (21%) to claimant's functional loss and four percent (4%) to pain and suffering. Dr. Martin assessed claimant a six percent (6%) permanent partial impairment to the body as a whole, with Dr. Rawcliffe refusing to give an opinion due to claimant's questionable range-of-motion findings. The Appeals Board finds the twenty-one percent (21%) functional impairment of Dr. Vaidya and the six percent (6%) functional impairment of Dr. Martin to be the more credible evidence in this case. The Appeals Board further finds no reason to place greater emphasis on Dr. Vaidya's twenty-one percent (21%) rather than Dr. Martin's six percent (6%) rating and gives equal weight to both. In comparing and compromising the two, the Appeals Board finds claimant has suffered a fourteen percent (14%) permanent partial impairment to the body as a whole on a functional basis.

In so finding, the Appeals Board affirms its support for the primary purpose of the Workers Compensation Act, to restore a worker's ability to perform work in the open labor market and to earn comparable wages. The respondent's accommodation of claimant within the restrictions set forth by Dr. Rawcliffe and Dr. Martin appears consistent with the recommendations provided by Donald E. Schrag, Ph.D., and further appears to be in the best interest of the claimant at this time.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 1, 1994, shall be and is modified in that claimant is awarded a fourteen percent (14%) permanent partial general body disability on a functional basis against the respondent, ADM Milling, and its insurance carrier, Old Republic Insurance Company, for injuries suffered on or about March 22, 1990.

Based on an average weekly wage of \$459.75, claimant is entitled to 90.43 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$24,506.53, followed thereafter by 324.57 weeks permanent partial general body disability compensation at the rate of \$42.91 per week, totalling \$13,927.30 for a total award of \$38,433.83.

As of November 30, 1994, there is due and owing claimant 90.43 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$24,506.53, followed thereafter by 154.57 weeks permanent partial general body disability compensation at the rate of \$42.91 per week in the sum of \$6,632.60, making a total due and owing of \$31,139.13 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$7,294.70 shall be paid at the rate of \$42.91 per week for 170 weeks or until further order of the Director.

Unauthorized medical up to \$350.00 is ordered paid to the claimant upon presentation of an itemized statement verifying same.

Claimant's contract of employment with his attorney is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$61.30
Continuation of Regular Hearing (6/21/93)	\$145.00
Deposition of George Martin, M.D.	\$146.20
Ireland Court Reporting Continuation of Regular Hearing (4/12/93)	\$200.53
Deposition of Jerry D. Hardin	\$197.45
Deposition of Donald E. Schrag, Ph.D.	\$215.16
Deposition of Robert A. Rawcliffe, M.D.	\$114.65
Todd Reporting Deposition of Shrikrishna Vaidya, M.D.	\$109.00
Transcript of proceedings of 5/26/93	Unknown
Deposition of Doug Goff	Unknown

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Jeffery R. Brewer, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director